93-731

Supreme Court, U.S.
FILED
SEP 20 1993

No. _____

In The
Supreme Court of the United States
October Term, 1993

JOHN WESLEY HALL, JR.,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Petitioner Pro Se,
A Member of the Bar of
This Court

October 29, 1993

QUESTION PRESENTED FOR REVIEW

When a state court holds that appointed counsel in capital cases are constitutionally entitled to just compensation and equal protection of the law, guaranteed by the Fifth and Fourteenth Amendments, by payment of a just, reasonable fee for his or her legal services, that court denies just compensation and equal protection of the law to criminal defense lawyers by paying appointed appellate counsel in a capital case $14.02-14.81 per hour when counsel's overhead is over $85 per hour while the court routinely orders reasonable compensation of $100 per hour and more in private litigation.

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STATE OF ARKANSAS,
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PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

OPINION BELOW

The orders and opinions of the Arkansas Supreme Court below were issued on June 21, 1993. They are unpublished. They appear in the Appendix.

JURISDICTION

The Arkansas Supreme Court decided these cases on June 21, 1993. This Petition for Writ of Certiorari was originally tendered within ninety days and is, therefore, timely.

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

§ 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in pertinent part:

> . . . nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the U.S. Constitution provides in § 1 that:

> . . . Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves a denial of just compensation and equal protection to appellate counsel in two Arkansas death penalty cases.

In 1991, the Arkansas Supreme Court held in *Arnold v. Kemp*, 306 Ark. 294, 813 S.W.2d 770 (1991), that the taking and just compensation clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment applied to an attorney's services in a capital case. In so holding, Arkansas was the last state to eliminate its "fee cap" for appointed counsel in capital cases.

Petitioner was appointed counsel for two indigent appellants in separate death penalty cases in the Arkansas Supreme Court: Johnie Michael Cox and Darrell Wayne Sheridan. The final fee orders in both of those cases were

A. *Petitioner's Appointment in Cox's Appeal*

On June 21, 1991, petitioner, a Little Rock, Arkansas lawyer, was contacted by the Phyllis B. Worley, Public Defender for White County, Arkansas, and asked to act as lead counsel in the death penalty appeal of Johnie Michael Cox. Cox had been represented at trial by two White County lawyers who had been relieved by the trial court for the appeal. In her letter to petitioner, Mrs. Worley stated that she was not qualified to handle an appeal of a death penalty case. Apparently no other lawyer in White County was available to handle the appeal because of lack of experience in criminal cases in general, and death cases in particular, a conflict of interest (*i.e.*, the prosecutor's staff), or the relieved lawyers. The trial judge, the late Cecil Tedder, required that lawyers in death cases in his court meet the minimum standards for capital counsel in 21 U.S.C. § 848(q)(6).[1]

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1. Letter from Worley to Hall dated June 20, 1991, ¶s 4-6:

> [Judge Tedder] has examined the White County Bar Association, and it appears that other than [trial counsel and one other] there are no attorneys in our Bar which meet the federal qualifications.
>
> Judge Tedder has requested that I contact you to determine whether you would be willing to accept this appointment, with me acting as local counsel and assisting you in this matter.
>
> The Court has been attempting to find counsel

Petitioner contacted Judge Tedder directly and declined the appointment because, at that time, petitioner already represented four death row inmates and Arkansas did not provide adequate compensation for appointed counsel in capital cases. Nevertheless, Judge Tedder appointed petitioner as lead counsel for the appeal.[2]

B. *Petitioner's Appointment in Sheridan's Appeal*

Petitioner was retained trial counsel in Sheridan's case tried in Benton, Arkansas for six days October-November

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for several weeks, and I know he would appreciate a prompt response. Please feel free to contact Judge Tedder directly if you have any questions. His office number is 279-6219. (bracketed material added)

2. *State v. Cox,* White County Circuit Court No. CR89-290 (Order of July 5, 1991):

> Counsel appointed for appeal, Phyllis Worley, has moved the court to appoint additional counsel for the appeal. She has pointed out to the court that she does not have the necessary experience required by 21 U.S.C. § 848(q)(4-10) to handle a capital murder appeal.
>
> The court has contacted John Wesley Hall, Jr., of Little Rock and asked him to accept appointment as additional counsel for the appeal. Hall has declined this appointment on the ground that Arkansas law does not provide adequate compensation to lawyers with the minimum experience required by federal law and his firm already represents four death row inmates.
>
> Over his objection, the court hereby appoints John Wesley Hall, Jr. . . . as lead counsel on appeal. Mrs. Worley will act as co-counsel for the appeal.

tried in Benton, Arkansas for six days October-November 1990.[3] After Sheridan's conviction and death sentence, petitioner was appointed by the trial court for the appeal in mid-November 1990, and petitioner accepted the appointment.

C. *Arnold v. Kemp, State v. Post, and Arkansas Fee Motions*

On July 15, 1991, just ten days after petitioner was appointed by Judge Tedder, the Arkansas Supreme Court decided *Arnold v. Kemp,* 306 Ark. 294, 813 S.W.2d 770 (1991), holding: that (1) an appointed attorney's services are "property subject to Fifth Amendment protection" under the takings clause and (2) requiring criminal defense lawyers to subsidize the cost of defense of capital cases went far beyond their pro bono obligation and denies them equal protection of the law under the Fourteenth Amendment. *Id.,* 813 S.W.2d at 774 & 776. Arkansas thus became the last state to strike down or remove an artificial "fee cap"; Arkansas' was $1,000 (formerly $350) in capital cases. Ark. Code Ann. § 16-92-108.

In *Arnold, supra,* 813 S.W.2d at 776, the Arkansas court stated:

> In awarding fees to Messrs. Arnold and Allen for reasonably expended services, we do not

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3. Petitioner only received 60% of the Sheridan family's financial obligation for his services at the trial. *Petition of John Wesley Hall, Jr., Appellant's Counsel, for an Award of Just Compensation in a Death Penalty Appeal,* in *State v. Sheridan,* Ark. CR90-295 (filed May 1993), at 10 n.11.

based on their customary hourly charges or fixed fees for services in criminal cases of this nature. To the contrary, the trial court should determine fees that are considered "just." In *Christo v. Sun Indus., Inc.*, 304 Ark. 227, 800 S.W.2d 717 (1990), we recognized various factors to be considered by a trial court in making its decision, on an award of attorneys' fees, including the experience and ability of the attorney, the time and labor required to perform the legal service properly, the novelty and difficulty of the issues involved, the fee customarily charged in the locality for similar legal services, the time limitations imposed upon the client's defense or by the circumstances, and the likelihood, if apparent to the court, that the acceptance of the particular employment will preclude other employment by the lawyer.

The court essentially was following Rule 1.5(a) of the Arkansas Rules of Professional Conduct, identical to the Rule 1.5(a) of the Model Rules of Professional Conduct.

After *Arnold,* the Arkansas Supreme Court completely revised its rules, and its Rule 6-6(c) was adopted in late 1992 effective January 1, 1993:

> (c) CONTENT OF MOTIONS FOR ATTORNEY'S FEES. All motions for attorney's fees from attorneys appointed to represent indigent appellants in criminal cases shall contain the following information: (1) the date of appointment; (2) the court which appointed counsel; (3) the number of hours expended by counsel in research, court appearances, and preparation of pleadings and

> appearances, and preparation of pleadings and briefs; (4) counsel's customary rate of compensation in similar cases; (5) the customary rate of compensation in similar cases of attorneys in the community; (6) the expenses incurred by counsel which are directly attributable to the case; (7) the experience of counsel in the representation of criminal appellants; (8) the relative complexity of the case. The motion shall be filed not later than 30 days after the issuance of the mandate. (emphasis added)

On January 19, 1993, the Arkansas Supreme Court reaffirmed *Arnold* in *State v. Post,* 311 Ark. 510, 845 S.W.2d 487 (1993), ordering the State of Arkansas to pay two lawyers $40,385.29 in a death penalty case at trial.

D. *The Underlying Appeals and Fee Petitions and Orders in these Cases*

The underlying appeals are *Sheridan v. State,* 313 Ark. 23, 852 S.W.2d 772 (May 3, 1993), and *Cox v. State,* 313 Ark. 184, 853 S.W.2d 266 (May 17, 1993).

In Cox's appeal, petitioner and his associate Craig Lambert filed a verified petition showing they performed 149.8 hours of legal services.[4] In Sheridan's appeal, petitioner and Lambert filed a verified petition showing

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4. *Petition of John Wesley Hall, Jr., Appellant's Counsel, for an Award of Just Compensation in a Death Penalty Appeal,* in *State v. Sheridan,* Ark. CR90-295 (filed May 1993).

they performed 168.75 hours of legal services.[5]

The *Sheridan* fee order was decided June 1, 1993 and was three sentences long:

> Counsel for appellant has filed a petition for award of attorney's fees in this death penalty case, and upon review of counsel's motion, memorandum and exhibits, the court awards $2,500, plus costs of $560.75. In making this award, the court reviewed the factors set out in his motion and memorandum and other facts including, but not limited to, the fact that the prepared for, researched and tried this matter below. We note that the substantial attorney's fees awards exhibited as a part of his motion were for federal trials, not appeals.

(The Arkansas Supreme Court ignored its own experience, subject to judicial notice, that petitioner had presented at least 75 appeals to that court and the Arkansas Court of Appeals and probably as many more to the United States Court of Appeals for the Eighth Circuit. *See* note 11, *infra*.)

Petitioner filed a petition for rehearing on June 4, 1993, pointing out that the Arkansas Supreme Court and Court of Appeals had recently approved of hourly rates in divorce and insurance cases of $100 and $300 in a contract case, and this was precisely the denial of equal protection and just compensation that the court held unconstitutional

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5. *Petition of John Wesley Hall, Jr., Appellant's Counsel, for an Award of Just Compensation in a Death Penalty Appeal*, in *State v. Cox*, Ark. CR91-16 (filed May 1993).

in *Arnold*. The motion for reconsideration was denied on June 21, 1993 in a one sentence order: "Motion of John Wesley Hall, Jr., for reconsideration is denied." The *Cox* fee order came out that same day awarding petitioner $2,200 attorney's fees. No petition for rehearing was filed in *Cox* because it was deemed unnecessary in light of the denial of rehearing in *Sheridan*.

Thus, petitioner and his associate received $14.02 per hour in *Cox* and $14.81 per hour in *Sheridan* on an overhead of over $85 per hour. That is not constitutionally just compensation, considering that the Arkansas appellate courts routinely award fees in excess of counsel's overhead here when private litigants are paying the fee[6] and paid a Little Rock law firm $5,000 to handle the state's appellee's brief in a non-death theft case where the Attorney General's Office disqualified itself.[7]

REASONS FOR GRANTING THE WRIT

ARKANSAS' ARBITRARY "FEE CAP" FOR APPOINTED APPELLATE COUNSEL IN CAPITAL CASES WHICH PROVIDED PETITIONER $ 14.02-14.81 PER HOUR WHEN IT AWARDS $100 AND MORE IN PRIVATE LITIGATION AND UNLIMITED EXPENSE TO THE STATE DENIES CRIMINAL DEFENSE ATTORNEYS WHO HANDLE APPOINTED CASES JUST COMPENSATION AND EQUAL PROTECTION OF THE LAWS BY THE

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6. Petitioner cited a plethora of cases from the last five years in the Arkansas courts found on CaseBase.

7. This was the case of Arkansas' former Attorney General convicted of theft. *Clark v. State*, 308 Ark. 84, 824 S.W.2d 345 (1992).

STATE'S REFUSAL TO AWARD A JUST, REASONABLE FEE FOR COUNSEL'S SERVICES.

A.

In 1991, the Arkansas Supreme Court decided *Arnold v. Kemp,* 306 Ark. 294, 813 S.W.2d 770 (1991), which held Arkansas' statutory "fee cap" of $1,000 for appointed counsel in capital murder cases, denied appointed counsel just compensation and equal protection of the laws in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The court held that appointed capital counsel was entitled to reasonable compensation. *Arnold, supra,* 813 S.W.2d at 774:

> Like the question before the Kansas Court, the core question before us is whether the services of an attorney are a specie of property subject to Fifth Amendment protection. The answer is yes.
>
> Unfortunately, we have perpetuated, throughout the years, a system of appointment without just compensation in many instances that is long past for correction. The only proper and permissible course for us to follow is simply to give effect to the plain language of our constitution. . . . In doing so, we declare that even if the rationale in *State v. Ruiz, supra,* was correct when it was decided, and we have strong reservations in this regard, the practice of criminal law has changed, as have the times. Arkansas has delayed in confronting the realities of contemporary criminal defense practice, particularly in the area of capital litigation, even as the concept of what

> constitutes due process has changed. New scientific developments and an increased awareness in areas of social consciousness have served to drastically raise the complexity of criminal litigation. As a result, our trial courts must appoint highly trained and skilled counsel if indigents are to be afforded their constitutionally mandated effective assistance of counsel.[8]

The court noted that this subsidization goes far beyond that is required of the attorney's *pro bono* obligation to the point of a Fifth Amendment taking without just compensation, relying on *Family Div. Trial Lawyers v. Moultrie,* 725 F.2d 695 (D.C.Cir.1984), which relied on *People ex rel. Conn v. Randolph,* 35 Ill.2d 24, 219 N.E.2d 337, 18 A.L.R.3d 1065 (1966); *Bias v. State,* 568 P.2d 1269 (Okla.1977); *State ex rel. Partain v. Oakley,* 159 W.Va. 805, 227 S.E.2d 314 (1976).

The court also held that appointed counsel in capital cases were denied equal protection of the law because they were required to subsidize the criminal justice system at personal expense. *Id.,* 813 S.W.2d at 775-76.

Arkansas thus became the last state to eliminate its arbitrary fee cap in criminal cases.[9]

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8. But note that the court does not seem to care whether highly skilled lawyers are involved in death penalty appeals because its action here is directly counter to *Arnold.*

9. See cases cited and discussed in Annots., *Construction of state statutes providing for compensation of attorney for services under appointment by court in defending indigent accused,* 18 A.L.R.3d 1074 (1968 & Supp.1993); *Validity and construction of state statute or court rule fixing miximum fees for*

This decision was reaffirmed in January 1993 in *State v. Post,* 311 Ark. 510, 845 S.W.2d 487 (1993), ordering the State of Arkansas to pay two lawyers $40,385.29 in a death penalty trial. However, in its arbtitrary setting of a fee in this case when it tells the bar and the world through its rules that reasonable compensation will be awarded, denies just compensation and equal protection of the laws in violation of the Fifth and Fourteenth Amendments.

B.

1. The order of the Arkansas Supreme Court on the attorney's fees issue in these capital cases is a denial of just compensation contrary to the decisions of this Court.

This Court has repeatedly held that "just compensation" under the Fifth Amendment is determined by an objective standard. *Kimball Laundry Co. v. United States,* 338 U.S. 1, 5 (1949); *United States v. Sioux Nation of Indians,* 448 U.S. 371 (1980); *United States v. 50 Acres of Land,* 469 U.S. 24, 35-36 (1984).

In *Kirby Forest Industries, Inc. v. United States,* 467 U.S. 1, 10 (1980), this Court referred to "just compensation" as follows:

> "Just compensation," we have held, means in most cases the fair market value of the property on the date it is appropriated. *United States v. 564.54 Acres of Land,* 441 U.S. 506, 511-13 (1970). "Under this standard, the owner is entitled to receive 'what a willing buyer would pay in

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appointed to represent indigent, 3 A.L.R.4th 576 (1981 & Supp. 1993).

> case to a willing seller' at the time of the taking." *Id.*, at 511 (quoting *United States v. Miller,* 317 U.S. 369, 374 (1943)). (footnotes omitted)

The decision of the Arkansas Supreme Court below applied no objective standard. Instead, it was an arbitrary standard which violates its own rules and cases, and, thus, due process.[10] Ark.S.Ct. Rule 6-6(c) (attorney's fee motions must provide hours expended, counsel's hourly rate, and customary rate in similar cases in the community, experience of counsel, and relative complexity of the case), quoted *supra*, provides the objective standard, and it was complied with by petitioner showing what hours were expended, what work was done on what days, what counsel's customary fees are, and what fees are paid for similar work by paying clients in Arkansas and by the federal courts under 21 U.S.C. § 848(q)(4-10). This submission was completely ignored by the court below in making an arbitrary fee award which has no relation to actual time spent, the normal hourly rate of this lawyer, the prevailing hourly rate in the community, and the lawyer's overhead.[11]

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10. It also violates ABA STANDARDS FOR CRIMINAL JUSTICE, *Providing Defense Services,* Std. 5-2.4 (2d ed.1981) ("Assigned counsel should be compensated for time and service performed. The objective should be to provide reasonable compensation in accordance with prevailing standards.").

11. This Court's fee of $5,000 in death cases under the CJA is not inconsistent. In *In re Berger,* 111 S.Ct. 628 (1991), the Court held that case-by-case analysis of fee petitions could not be done by the Court because it has neither the time nor experience to do it. The Arkansas Supreme Court, however, expressly has adopted a rule requiring consideration of these

That court, as well as practically all other courts to have considered the issue in the last ten years, has already decided that an attorney's services are a specie of property subject to taking under the Fifth Amendment, and attorneys are entitled to reasonable compensation. *Arnold,* 813 S.W.2d at 774 (quoted *supra*). When a lawyer has to lose money to take an appointed case, and, in effect, support the state in one of its constitutionally mandated duties (*see Post, supra*) it is truly a "taking."[12]

2. What the Arkansas Supreme Court gives with one hand, however, it takes away with the other, and it effectively held in this case that the Fifth Amendment takings clause of the Constitution does not apply to death penalty *appellate* lawyers while it does apply to trial counsel.[13] The order of the Arkansas Supreme Court thus violates the equal protection clause of the Fourteenth Amendment

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failed to follow in violation of the Fifth and Fourteenth Amendments.

12. In *Arnold,* the lawyers' brief reflects that they would have charged a $30,000 fee at $75-90 per hour in that locale which was about three times their overhead. *Arnold v. Kemp,* Ark.S.Ct. CR91-60, Appellants' Brief at 104, 125-26.

13. The Arkansas Supreme Court's order denigrated petitioner's appellate experience. The court could have taken judicial notice of the number of cases petitioner has argued there. CaseBase® reveals over 80 *reported* cases. A Lexis® search would produce about 100 federal cases. Petitioner has argued at least 80-90 times in St. Louis before the Eighth Circuit, once in the U.S. Supreme Court, twice in the Sixth Circuit, and once in the Federal Circuit.

because the Arkansas Supreme Court has classified criminal defense lawyers taking capital appointments differently than other lawyers in making fee awards without there being any pretext of a rational state basis or any other basis possibly cognizable by the law.

One would think in the larger scheme of things because of the nature of the work and the legal skills required that a capital case lawyer would be worth more (or at least as much) per hour than a divorce lawyer. Not in Arkansas. Here, it is worth about 1/7 as much.

C.

Petitioner is not seeking an order from this Court dictating what reasonable compensation should be for handling a death penalty appeal in state court. All petitioner seeks is an objective determination of what is "reasonable"; something that the Arkansas court refused to do in this case even when requested in rehearing to do so.

On this record, $14.02-14.81 is not reasonable when petitioner has stated without contradiction that his overhead is over $85.00 per hour. Even CJA rates in Arkansas are $40-60 per hour in non-death cases.[14] In death cases, petitioner has been awarded $150-163 per hour by the United States District Court for the Eastern District of Arkansas in two separate fee awards in the same case, with a specific finding that that rate was reasonable, each time making a full analysis of what the prevailing rate was, the rate of counsel, the complexity of the case, and the hours and services performed. *Fairchild v. Lockhart,* PB-C-85-282 (Order of Jan. 30, 1991) (a part of the submission to

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14. In some districts, CJA rates are higher.

the Arkansas Supreme Court below). Even non-experienced lawyers have received hourly rates of $125 per hour in death cases. *See, e.g., Perry v. Lockhart,* PB-C-83-275 (Order of Dec. 9, 1992) (also part of the submission below).

Finally, petitioner provided the court with citations of cases were it awarded $100 and well more in many reported cases where private litigants were involved. Most recently, the Arkansas Court of Appeals affirmed a fee award of $100 per hour in a divorce case involving rural Arkansas lawyers and the Arkansas Supreme Court later cited that case with approval. *Olaimey v. Turk,* 33 Ark. App. 28, 799 S.W.2d 572 (1990) (en banc) (awarding $100 per hour for appeal in domestic case), cited with approval in *Green v. Bell,* 308 Ark. 473, 826 S.W.2d 226 (1992) ($40,000 fee affirmed).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN WESLEY HALL, JR.
523 West Third Street
Little Rock, Arkansas 72201
(501) 371-9131

Petitioner Pro Se,
A Member of the Bar of
This Court

October 29, 1993

APPENDIX

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Office of the Clerk
SUPREME COURT
COURT OF APPEALS
STATE OF ARKANSAS
Justice Building
625 Marshall Street
Little Rock, AR 72201

June 21, 1993

John Wesley Hall, Jr.
Attorney at Law
523 W. 3rd Street
Little Rock, AR 72201

RE: CR91-16. Johnie Michael Cox v. State of Arkansas

Dear Mr. Hall:

The Supreme Court has allowed you attorney's fees in the amount of $2,200.00 and costs in the amount of $357.35 for a total of $2,557.35 in the above styled case.

Please send invoice in triplicate for this amount and upon receipt, payment will be made.

Sincerely,

/s/ Rae Millerd
Rae Millerd
/rm
Enclosure (W-9)

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

June 1, 1993

John Wesley Hall, Jr.
Attorney at Law
523 W. Third Street
Little Rock, AR 72201

Re: CR90-295 Darrell Wayne Sheridan
v. State of Arkansas

Dear Mr. Hall:

The Supreme Court made the following order in the above styled case today:

> "Petition for award of attorney's fees is granted. See per curiam this date."

Please send invoice in triplicate for $3,060.75 and upon receipt, payment will be made.

Sincerely yours,
/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
Enclosure
cc: Clint Miller

SUPREME COURT OF ARKANSAS

No. CR90-295

DARRELL WAYNE SHERIDAN,
APPELLANT,

V.

STATE OF ARKANSAS,
APPELLEE.

PETITION FOR AWARD
OF ATTORNEY'S FEES

GRANTED
JUNE 21, 1993

PER CURIAM

Counsel for appellant has filed a petition for award of attorney's fees in this death penalty case, and upon review of counsel's motion, memorandum and exhibits, the court awards $2,500, plus costs of $560.75. In making this award, the court reviewed the factors set out in his motion and memorandum and other facts including, but not limited to, the fact that the prepared for, researched and tried this matter below. We note that the substantial attorney's fees awards exhibited as a part of his motion were for federal trials, not appeals.

Office of the Clerk
Supreme Court of the State of Arkansas
Arkansas Court of Appeals
Justice Building
625 Marshall Street
Little Rock, AR 72201

June 21, 1993

John Wesley Hall, Jr.
Attorney at Law
523 W. Third Street
Little Rock, AR 72201

Re: CR90-295 Darrell Wayne Sheridan
v. State of Arkansas

Dear Mr. Hall:

The Supreme Court made the following order in the above styled case today:

"Motion of John Wesley Hall, Jr., for reconsideration is denied."

Sincerely yours,
/s/ Leslie W. Steen
Leslie W. Steen, Clerk

LWS:rh
cc: Clint Miller